

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
Delivery of Video Programming	)	

**COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION**

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## **SUMMARY**

Members of the Broadband Service Providers Association (“BSPA”) deploy and operate facilities-based, advanced, last-mile broadband networks for the delivery of innovative bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.<sup>1</sup> BSPA’s mission is to promote and support the development of a competitive, facilities-based, broadband industry that will increase infrastructure investment, create customer choice, lower prices, and provide critical network diversity.

The BSPA continues to see compelling evidence that facilities based wireline competition brings unique market benefits that are not created by satellite networks. A new GAO study is the first research that documents that the market share of DBS services varies significantly based on local market characteristics. DBS market share is weakest in more urban markets where incumbent MSOs have upgraded to full digital networks offering bundled services. Major incumbent cable operators advocate policies that would accelerate the elimination of important competitive protections based on the incorrect assumption that as a result of DBS entry, multichannel video markets are fully competitive, while continuing to pursue network upgrade strategies that will inherently limit the market share and effectiveness of satellite as a competitor, and continuing to engage in conduct that is aimed at hobbling the growth of a competitive wireline broadband industry. The BSPA urges the FCC and Congress to pursue policies that will foster the continuing and sustained development of additional facilities

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<sup>1</sup> The current members of BSPA, all of which are last-mile, facilities-based providers, are: Everest Connections, Knology, Astound, PrairieWave Communications, Sigecom, and SureWest Communications.

based competition that has a proven ability to bring the desired impact of full competition to local markets.

The BSPA commends the Commission for continuing to investigate the barriers to entry faced by Broadband Service Providers (“BSPs”) and other competitors to incumbent cable operators. As discussed more fully below, BSPs continue to advocate the need to update the current program access rules to reflect today’s technology and market structure, which include the distribution of video programming on Internet-based platforms. Other significant barriers to entry that continue to be of concern to BSPA members include the continued use of discriminatory and predatory pricing campaigns by incumbent cable operators in an effort to force BSPs from the market, and barriers associated with access to multiple dwelling units (“MDUs”) and utility poles. These issues significantly impact current BSP operations, but more importantly, have the potential to negatively impact future investment in new BSP facilities to the detriment of competition and consumer welfare.

Congress and the FCC are also considering changes to current cable franchising requirements. BSPs have historically been franchised as cable operators and understand both the costs and constraints of the current franchising structure. Future investments and growth of competition would be benefited by changes in the current franchise process especially as they relate to franchise boundaries and build out requirements. Any changes in these areas need to be applied equally to all new competitors regardless of the technology used or whether a network is newly constructed or the upgrade of an existing network facility.

BSPs are also supportive of continued migration to all digital broadcasting and network structures. As the industry implements this migration, policies should be pursued that will allow network operators to take advantage of the inherent capability of these digital networks to offer

consumers new packages of content that can respond to their desire for packages that cannot be economically delivered on today's analog networks.

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The Broadband Service Providers Association (“BSPA”) hereby submits these comments in response to the Federal Communications Commission’s (“Commission’s”) Notice of Inquiry in the captioned proceeding.<sup>2</sup> In the *Notice*, the Commission seeks information, comment, and analysis regarding competition in the market for the delivery of video programming and barriers to such competition.

**INTRODUCTION AND BACKGROUND**

Through the *Notice*, the Commission has begun the process of preparing its *Twelfth Annual Report* to Congress on competition in the market for delivery of video programming. In the last eleven years, particularly since passage of the Telecommunications Act of 1996,<sup>3</sup> new competitors, such as the members of the BSPA, have made significant inroads in the multichannel video programming distribution market.<sup>4</sup>

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<sup>2</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, FCC 05-155, MB Docket No. 05-255 (rel. Aug. 12, 2005)(“*Notice*”).

<sup>3</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151 *et seq.* (“1996 Act”).

<sup>4</sup> The current members of BSPA are: Everest Connections, Knology, Astound, Sigecom Communications, PrairieWave Communications, and SureWest Communications.

The BSPA is a trade association representing next-generation companies deploying competitive facilities-based, advanced, last-mile broadband networks offering bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country. The BSPA's mission is to promote the development of a competitive, facilities-based, broadband industry that will increase infrastructure investment, create customer choice, lower prices, and provide critical network diversity.

As providers of state-of-the-art cable, telephone, and Internet service over advanced local networks in many urban, suburban and rural areas throughout the country, BSP's are key examples of the entry of new, facilities-based competitors envisioned by the 1996 Act. The interconnection provisions of the 1996 Act created the opportunity for new entrants, like BSPs, to offer telephone service. With the advent of cable modems, allowing the delivery of broadband access services, along with the deployment of hybrid fiber coax, BSPs have emerged as multi-faceted competitors offering significant price and service options to consumers for video, voice, and broadband access.<sup>5</sup> This technology and business model to offer bundled voice, video and data services has now become a model for many network upgrades or new construction that are being pursued by incumbent cable operators, incumbent telephone companies or other new technology entrants.

BSPs are leaders in migrating video to all-digital platforms, consistent with mandates added by the 1996 Act and the Commission's digital television transition. BSPs are building high-capacity digital networks needed to host the current and next generation services emerging in today's digital environment. BSPs, which directly compete with incumbent cable operators

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<sup>5</sup> The late 1980's and early 1990's business model of cable overbuilders differs dramatically from today's BSPs in that the business model of the previous generation relied exclusively on a single revenue stream from cable television services as the basis for building new networks.

and other multichannel video programming distributors (“MVPDs”), therefore offer a unique insight into the status of competition in the market for delivery of video programming.

The BSP business strategy has been unique in philosophy and infrastructure. The offering of video, voice, and high-speed data services over a unified network – the so-called “triple play” – is central to the BSP business model. By creating three potential revenue streams from each customer served, BSPs are able to amortize the cost of their fiber-rich networks (which are capable of delivering all digital or a mix of digital and analog signals) over customers purchasing a single service or a bundle of services. BSPs deliver these advanced service options to rural, suburban and urban areas, advancing a fundamental purpose of the 1996 Act to provide advanced services to all Americans.

Each BSP system has a state of the art headend facility, which aggregates programming content and a telecommunications switching platform, and connects customers to the public switched telephone network (“PSTN”) and Internet. A fiber optic distribution network connects the headend to distribution nodes. Distribution nodes serve from 20 to 500 potential customers. Member companies use different technologies for linking nodes to customer premises, using combinations of coaxial cable and twisted copper pair (most common), exclusively coaxial cable to the home, or fiber to the premise (“FTTP”). Many systems include dark fiber, which will facilitate capacity expansion, and system upgrades as new technologies emerge.

These advanced networks enable BSPs to distinguish themselves in the market place by offering the most technically advanced services, bundled in packages responsive to customer demand. These bundles include three basic services – multichannel video/media, telephone (local and long distance primary line basic telephone service plus enhanced services, *e.g.*, voice



mail),<sup>6</sup> and high-speed Internet access (mostly via a cable modem at speeds up to 10.0 Mbps, typically with the option for customers to choose their Internet Service Provider (“ISP”)).

The multichannel video/media component of member offerings includes next generation digital television, and typically includes over 180 channels of both video and music entertainment options. BSPA member companies have achieved some of the highest penetration rates of enhanced digital television in the industry, with many systems having take rates for digital packages of 60 to 90 percent of their video customers. BSPA member companies have also been some of the first operators to offer next generation services such as video-on-demand (“VOD”), subscription video-on-demand (“SVOD”),<sup>7</sup> and interactive television, made possible by their advanced system topology.

The BSP model has expanded the deployment of advanced services to average consumers. Because BSPs provide a combination of voice, video and Internet services over a single network, they can maintain healthy operations without attaining the highest market share in any one service. The existence of a BSP in a market increases competition by adding consumer choice, which places downward pressure on prices. The BSP business model makes advanced services affordable to a wider array of customers, cutting across market demographics, and increasing overall penetration rates. As a result, BSP entry expands the number of consumers with access to advanced services at affordable prices. It is no surprise that in local markets throughout the country, consumers and local officials are enthusiastically endorsing BSP

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<sup>6</sup> Members provide telephony using circuit-switched or IP-enabled networks. Most telephony offerings are equivalent to primary line service that is fully powered with access to enhanced 911.

<sup>7</sup> SVOD refers to services that allow a subscriber to access content from a particular library on a subscription fee basis, and provide typical VOD functionality, including the ability to select particular programming from the library on demand, and to control program capabilities (*e.g.*, start/stop, pause, fast forward, rewind, etc.).

competition and BSPs have evolved to become a significant competitive force in the markets they serve.

The 2004 GAO Report, *Wire-Based Competition Benefited Consumers in Selected Markets*,<sup>8</sup> largely validated the view that competition among wireline MVPDs results in lower prices and increased consumer choice, when compared with competition between cable operators and satellite providers. The Report offered a review of actual competition created by BSP entry in select markets. The GAO concluded that rates for cable services were 15 to 41 percent lower in markets where a BSP offered services in competition with an incumbent cable provider. This market impact demonstrates the importance of BSP or other wireline entry into the market for delivery of video programming to offer consumers competitive services and prices, as well as the fallacy of the view that competition from the DBS industry sufficiently constrains the market power of incumbent cable operators. It is also significant that the GAO report documented lower prices for telephone and high-speed Internet service due to the presence of BSP competition.

The remainder of these comments responds directly to the Commission's request for statistics that would enable it to analyze actual competition in this industry, as well as the Commission's request for information about barriers that inhibit competition from BSPs, or foreclose market entry altogether. Despite the effectiveness of the BSP business model and the success of BSPA members in the markets where they have entered, a key component of the BSP model is the assured ability to access the programming content necessary to compete in the market for the delivery of video programming. In addition, because BSP network construction begins many months before services are deployed, incumbent cable providers have the

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<sup>8</sup> Government Accountability Office ("GAO"), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, Feb. 2004 ("GAO Wire-Based Competition Report").

opportunity to pursue pre-emption strategies prior to system activation of services being offered. Discriminatory and predatory pricing by incumbent cable operators, access to MDUs and access to poles also continue to be competitive concerns of BSPA members. In short, as recognized by the Commission in the *Eleventh Annual Report*, many of the barriers reported by the Commission in its *First Annual Report*, still persist today.<sup>9</sup>

## **DISCUSSION**

### **I. BSPs CONTINUE TO EXPAND SERVICE AND ARE A COMPELLING MODEL FOR COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING**

#### **A. Statistics in Response to the Notice**

In an effort to more accurately depict the BSP segment of the industry, the following section consolidates statistics for BSPA members as well as additional BSPs who, although not BSPA members, have agreed to permit the BSPA to incorporate their figures into the statistics reported herein.<sup>10</sup> All active BSP networks reported last year continue to operate and gain financial strength. BSPs continue to invest in existing network expansions and upgrades, expand their customer base and increase the number of services sold. Some consolidation has begun within the BSP segment creating larger organizations, and in some cases new owners and investors. A successful IPO, debt restructuring, and access to new debt all indicate that there is general financial health in the segment. However, it should also be noted that new franchise activity has been very limited. Several original franchises have also been converted to an OVS

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<sup>9</sup>*Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755 (2005) ("*Eleventh Annual Report*").

<sup>10</sup> Included in these statistics as BSPs are facilities-based providers that hold local franchises and/or OVS authority and provide voice, video and broadband access services. Municipal overbuilders and other public entities that provide cable and additional services are not included in these statistics. Beyond these basic statistics, all comments and policy positions presented in these comments are the represented position of the listed BSPA members.

structure, which enabled some BSPs to eliminate build out requirements.

BSPs, all of whom have entered the market since the 1996 Act, have operations in nearly half the states in the country, including all major regions other than the Pacific Northwest.<sup>11</sup> BSPs continue to have over 16 million households under active franchises where they offer service, and have 2 million additional households under franchise in anticipation of future access to the capital necessary to build. Constructed systems now operate over 50 headend facilities and pass approximately 4.4 million homes, representing over 50,000 miles of fiber distribution network and over \$6 billion of capital investment. In the aggregate, BSPs have over 1.3 million customers.

Despite many continuing challenges, most BSPs witnessed increases in customer penetration and services sold from continuing operations through 2004 and into 2005. BSPA members continue to have an average customer penetration rate of over 28 percent. On a service category basis, BSPA members have an average service penetration rate of 92% for cable television, 65% for voice telephone, and 43% for High Speed Data. More importantly, over 30 percent of BSPA member customers have upgraded to a digital tier of service. Viewing each service category as a separate “revenue generating unit” (“RGU”), on average, BSPA members have sold over 2 RGU’s or services per customer over their networks.

**B. Summary Review and Import of GAO Telecommunications Report GAO-05-257 -- Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets**

The incumbent cable industry has historically urged that the Commission find that “the market for the delivery of video programming is fully competitive and that cable cannot be

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<sup>11</sup> BSPs currently have operations in Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, D.C., and Wisconsin.

considered dominant given the availability of fully substitutable alternative multichannel services (DBS) and other video programming options.”<sup>12</sup> As the basis for this assertion, incumbent operators typically offer the national market share of DBS providers, and urge that that the most recent annual reports released by the Commission demonstrate that the Cable Television Consumer Protection and Competition Act of 1992<sup>13</sup> can be repealed. The BSPA disagrees.

The BSPA has always challenged this notion, urging that DBS has not created a comparable pricing and service impact as wireline BSP competition. For example, the *GAO Wire-Based Competition Report* documented the full competitive impact of BSPs in the markets they serve. BSPs have been able to achieve significant market shares that range from a low of 25% to as high as a 50% share of specific types of services offered on their advanced networks. While these markets represent less than 2% of the total, they are still the best examples of fully competitive markets that foster better service and lower prices.

The BSPA has asserted that the best way to assess the existence of real competition is to look at individual markets. Our hypothesis was that the type of market and the type of wireline competition DBS faces would significantly impact the market share of DBS providers. This hypothesis was based on the experience of BSPA members in their own markets, where it has been observed that DBS market share was significantly impacted by the presence of a fully upgraded wireline network offering bundled service.

The GAO conducted a study released in April 2005 that explored this hypothesis on a more systematic basis.<sup>14</sup> This new study confirms that the levels of market share and

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<sup>12</sup> See, e.g., *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Reply Comments of NCTA, MB Docket No. 03-172, at 19 (filed Sept. 26, 2003).

<sup>13</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified in scattered sections of 47 U.S.C. §§ 521-611.

<sup>14</sup> GAO, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets*, GAO 05-257 (Apr. 2005).

competition achieved by DBS vary widely by local market characteristics, and the numbers continue to underscore the market dominance of major MSOs in urban and suburban markets:

2004 DBS Penetration Rates					
Geographic Comparisons			Cable Competition Comparisons		
Rural	Suburban	Urban	Not upgraded	Partial upgrade	Fully Upgraded
29%	18%	13%	36%	16%	14%

Significantly, the slowest DBS growth rates have occurred in markets characterized by a fully upgraded, digital cable system, offering bundled services. In particular, in markets where there is no cable service, DBS penetration is 68%. In markets where the incumbent MSO and a BSP compete with fully upgraded networks, the DBS share is 8% or less. The study also documented that the aggregate DBS growth rate in fully upgraded cable markets was only moderate when compared to other market segments.

DBS share in a given market is generally split between the two primary DBS service providers. Therefore individual DBS competitors in the primary markets for MSOs (upgraded suburban and urban markets) will likely have less than 10% market share versus the incumbent cable share of 65 to 85% share.

A critical policy question for the Commission is when competitive characteristics in a market are such that it can be found to be “fully competitive”, which, according to the incumbent cable industry implies that certain competitive protections currently in place can be relaxed. Essentially, based on national numbers, MSOs try to characterize markets where they in fact have as much as 85% market share and a scale advantage of at least 6 to 1 to their nearest competitor as fully competitive. At the same time, incumbents pursue strategies that can sustain that level of market dominance by fully upgrading their legacy networks to the triple play

structure first implemented by BSPs, and pursue various strategies, discussed below, that are designed to inhibit competitive entry.

BSPA believes that the Commission must take a more nuanced, and market-centric view to competition, and gather the data necessary to understand the true nature of competition in the multichannel video programming market. Specifically, BSPA requests that the Commission:

1. annually collect and report on market data similar to the most recent GAO Study;
2. reject the notion that individual markets are considered fully competitive until competitors in those markets have achieved an aggregate 25-30% market share; and
3. continue to develop and implement policies, as discussed below, that address the continuing need for the development and entry and of wireline broadband competition in local markets.

Distributors of video programming, including the BSPA and members of the cable industry, assist the Commission with its statutory responsibility to report to Congress on the *status of competition* in the market for delivery of video programming by providing relevant data and information pertaining to competition in the market. In order to assess competition in any market, whether it is for video programming or cola, a determining factor is defining the market—in other words, which products are market substitutes for one another. The genesis of this entire inquiry is to assess whether competition in the market for the delivery of video programming is providing consumers with increased choice, better services, higher quality, and greater technological innovation. The BSPA submits that it is competition among wire-based competitors, not between wire-based competitors and satellite providers that delivers the most significant competitive benefits to consumers. This assertion does not in any way diminish the value of competition and geographic coverage provided by DBS providers. It does suggest that

we should continue to pursue policies that will foster the development of facilities based wireline competition, and eliminate barriers to competitive entry.

There are several potential reasons why satellite competition does not deliver the benefits to consumers compared with direct, wireline competition. The full substitutability or comparability of the service offerings is subject to debate. Satellite systems do not support the level of interactive programming offered by upgraded cable systems. They also cannot offer the same bundle of services offered on wireline systems. Moreover, DBS-based Internet service, to the extent it is offered, is typically at lower speeds than terrestrial, wire-based networks. In addition, in many urban settings, there are situations where it is either impossible or impractical to mount dish antennas.

The result is a cable industry that holds more than 75 percent market share of even a broadly defined MVPD market,<sup>15</sup> and an industry that has significantly higher market shares in many markets even though two DBS competitors are available to consumers. The evidence of lower prices resulting from DBS competition for the delivery of video programming is very limited—cable rates have continued to rise faster than inflation, leading Congress to conduct hearings on cable prices, as well as to commission studies in an effort to better understand the phenomenon.<sup>16</sup>

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<sup>15</sup> Tenth Annual Report, 19 FCC Rcd at 1619-21.

<sup>16</sup> See, e.g., General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Oct. 2003; *Telecommunications: Issues in Providing Cable and Satellite Television Service*, Oct. 15, 2003; see also Testimony of Gene Kimmelman, Senior Director Public Policy and Advocacy Consumers Union Oversight of the Satellite Home Viewer Improvement Act Subcommittee on Telecommunications and the Internet, Mar. 10, 2004 (“During the period when satellite subscription increased to cover about 20 percent of the multichannel TV market, cable rates soared almost three-times faster than inflation -- up about 53 percent -- since Congress launched rate deregulation in the 1996 Telecommunications Act. Today, if consumers nationwide had a second cable wire serving their community, instead of one cable company and two satellite providers, they could be saving as much as \$4.5 billion a year”).



By comparison, in markets with BSP entry, customers enjoy 15 to 41 percent lower prices, more robust service offerings and increased provider choice. Unfortunately, only about two percent of Americans receive the benefits of wireline competition in the market for the delivery of video programming.<sup>17</sup>

Relying on national statistics related to the total size and growth of the satellite industry, the cable industry overstates the impact of DBS competition. A market-by-market analysis is a more accurate means of analyzing competition in the market for the delivery of multichannel video programming, and one that should be pursued by the Commission.

## **II. BSPs CONTINUE TO FACE SIGNIFICANT BARRIERS TO ENTRY**

### **A. Access to and Pricing of Video Programming and Other Digital Content Remain a Significant Long-term Threat to BSP Entry**

Fair access to content means that all competing distributors should have the same assured access to content. Without fair access, those who control the access to content can create artificial winners and losers. In many cases, BSPs are dependent on program suppliers that are either partially or fully owned by the incumbent cable operators with which BSPs compete for customers. In these circumstances, suppliers face incentives to discriminate against BSPs and other non-cable competitors with respect to providing fair and equal access to programming and content.

Because these vertical relationships are also being replicated in the high-speed data market, access to digital video content for broadband Internet delivery is becoming as critical as

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<sup>17</sup> See GAO *Wire-Based Competition Report*, at 7. See also Consumer Federation of America and Consumers Union, *The Continuing Abuse Of Market Power By The Cable Industry: Rising Prices, Denial Of Consumer Choice, And Discriminatory Access To Content*, at 4, Feb. 2004.

access to traditional video content for cable TV delivery.<sup>18</sup> High-speed Internet networks are now capable of delivering the same video content as historical MVPD systems.

Section 628 protection was essential for the development of DBS-based competition and it was a necessary foundation for the early development of other new competition. There is no evidence that the original statute did anything other than support the growth of competition.

The existing statute has narrow application to satellite-delivered content which -- the predominant form of distribution to the industry in 1992 -- but does not apply to terrestrially delivered content (the so-called "terrestrial loophole"). Terrestrial distribution, however, has emerged as an alternative to satellite-based distribution, particularly for large operators with significant regional clusters, where programming such as local sports and news content, which has grown in importance, -- is delivered on terrestrial networks to the clustered communities.

Moreover, Section 628 also has no application to any form of IP technologies used to deliver video or other content to PCs, TVs or other end use appliances. The current 628 statute has been effective but it needs a major update. The same basic market conditions that existed in 1992 exist today but they relate to a broader range of competing technologies and a stronger market position of vertically integrated operators, and likely abuse if allowed. Network operators have never owned as much content as they do today and they continue to seek more. The most visible example of incumbent's commitment to expand content ownership was Comcast's proposed takeover of Disney last year.

Incumbent cable operators have also gone through significant consolidation and realignment of geographic territories. The most recent example is the proposed Comcast and

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<sup>18</sup> For instance, the leading suppliers of High Speed Data connections are incumbent cable operators offering cable modem service. The headend facilities that host the new integrated systems provide significant new opportunities to control the exclusive availability of content they have an equity position in.

Time Warner acquisition of Adelphia systems, resulting in significant increases in major clusters that are interconnected by high capacity terrestrial fiber transport. The net result will be stronger regional market positions where the incentive and opportunity to gain proprietary access to local sports and news programming has never been greater; the ability to distribute that programming terrestrially also ensures that this programming will not be subject to the current Section 628.

The level of regional clustering that has occurred over the past three years is unprecedented in the industry, as indicated in national maps showing the evolution of regional clustering from 2002, just prior to the AT&T/Comcast merger, to after closing of the proposed acquisition of Adelphia systems by Time Warner and Comcast. As can readily be seen from three maps that BSPA will file under separate cover in this docket, (which show the forecast clusters of Comcast and Time Warner assuming successful closure of the proposed Adelphia acquisition), the level of regional clusters is unprecedented, and creates a whole new dynamic of regional power that needs to be understood and addressed.

One concern is that this increased level of clustering increases both the incentive and opportunity for incumbents to use access to content as a strategic barrier to competition. As the Commission knows, after passage of the 1996 Act, many new entrants were experiencing strategies of denied access to content. These specific situations have been vigorously challenged at the FCC and through Congress. Last year the Senate Antitrust Subcommittee held a cable competition hearing that included content access as a primary topic. At that time potential legislation was being considered that would permanently fix the "Terrestrial Loophole." The immediate response of certain cable incumbents was to correct many of the historical examples of denied access that could not be challenged under Section 628 as a result of the terrestrial

loophole. The strategy would appear to be to temporarily eliminate current examples, in order to avoid any permanent constraints.

A provision to eliminate the terrestrial loophole is included in Section 13 of the *Broadband Investment and Consumer Choice Act*, S. 1504, recently introduced by Senator Ensign. One of the unique aspects of the proposed Amendment to Section 628 is the broad range of parties that support this legislation when they have significant disagreements on most other policy issues. Parties that support the proposed Amendments to Section 628 include most groups that want to bring either new competition or new technologies to the market. These parties include telephone companies, broadband service providers, satellite operators, wireless operators, small cable operators that have no vertical integration, consumer groups, and government organizations seeking to foster additional competition.

Fair access to all forms of content, including video programming, continues to dictate whether BSPs or others will be able to provide the benefits of wireline competition to consumers. The Commission should encourage Congress to expand existing program access regulations as prescribed in these proposed amendments to Section 628 to include all forms of digital content, without reference to a particular distribution platform.

**B. Predatory and Discriminatory Pricing Continue as Significant Barriers in Existing BSP Markets and Could Have Broader Impact on New Market Entry**

In response to last year's *Notice of Inquiry*, the BSPA again raised concerns regarding the long-term impact of targeted cable incumbent pricing schemes on wireline competition. Specifically, the BSPA highlighted examples of cable incumbent discounts that were at best

discriminatory, and potentially predatory.<sup>19</sup> These pricing schemes work, because incumbents are able to selectively target particular customers, rather than offering them to every subscriber in a market. We suggested some solutions. First, in order to make such schemes more costly and provide a disincentive for their use, cable incumbents should be required to provide a written notice to all customers in their local franchise area of all new rates, including promotional rates. Second, regardless of the existence of “effective competition” under Section 623, uniform pricing should be required throughout a franchise area to help minimize the ability of incumbents to sustain such practices, even where incumbent operators are deemed to face “effective competition.”<sup>20</sup>

Targeted pricing schemes on the part of cable incumbents remain a significant barrier to entry for BSPs that the Commission should squarely address. Given that BSPs engage in a public franchising process prior to deployment and given the visibility of construction, cable incumbents are in a position to target offers to only those customers who have a choice of provider. That these offers occur in the face of cable rates that are increasing faster than

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<sup>19</sup> See *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the Broadband Service Provider Association, MB Docket No. 04-227, at 14 (filed July 23, 2004). Predatory pricing occurs when “a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.” *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2587 (1993). To establish predatory pricing, one must show that the alleged predatory prices are below an appropriate measure of costs, and the alleged predator must have a reasonable likelihood of recouping lost profits. *Id.* However, actual predatory conduct is not necessary in order to discourage market entry. Discriminatory pricing, distinct from predatory pricing, is the practice of offering different prices for the same service to similarly situated customers.

<sup>20</sup> As a general matter, the Act prohibits targeted discounting of cable services. For example, Section 623(b) states that “[a] cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.” Section 623(b)(1), provides, however, that such a uniform rates structure is not required in geographic areas in which the cable operator faces “effective competition,” as defined in Section 623(l)(1) of the Act, which includes markets where a total of 15 percent of households take satellite service.

inflation provides further evidence of their anticompetitive purpose. Moreover, although the BSPA reported on this the past two years, abusive pricing behaviors have continued unabated.<sup>21</sup>

The Commission has previously expressed concern about these types of pricing strategies. In the context of the AT&T Broadband/Comcast merger, for example, the Commission found that the “representations [of AT&T Broadband and Comcast] leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers”<sup>22</sup> and that “[n]otwithstanding the merger, AT&T and Comcast already have the incentive and ability to target pricing in an anticompetitive manner, as evidenced by the RCN’s and BSPA’s allegations and Applicants’ responses to those allegations.”<sup>23</sup> The Commission continued:

We also disagree with Applicants’ claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be pro-competitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry . . . [T]argeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilder’s inability to compete against an incumbent who uses such strategies.<sup>24</sup>

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<sup>21</sup> A very graphic example of this occurred in South Dakota, where the incumbent cable provider put quarter page identical ads on February 9, 2005 in two local newspapers for free phone service with subscription to a “Digital Bundles Trio.” However in the Sioux Falls paper, where the incumbent has no BSP competition, the advertised rate was \$69.95 per month, while in Watertown (a community one-seventh the size of Sioux Falls), where the incumbent has BSP competition, the rate advertised was \$49.95. Two things are apparent. First, the \$49.95 price is at or below cost, and second, the incumbent is using monopoly revenues to support the below-cost pricing in a competitive market.

<sup>22</sup> *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23292-93 (2002).

<sup>23</sup> *Id.* at 23293.

<sup>24</sup> *Id.* at 23292-93.

The Commission went on to state that regulatory action may be warranted: “Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level.”<sup>25</sup>

The Commission has identified targeted discounts offered by cable incumbents as problematic and accepted that regulatory intervention may be required. It is time for the Commission to directly, or indirectly through Congress, craft policies to eliminate these activities. BSPA proposes that cable operators be required to fully and fairly disclose all rates and promotions offered to any customer in a local franchise area. The Commission should also consider whether, under Section 623, even where a cable operator is deemed to face “effective competition,” the Commission may require uniform pricing throughout a franchise area to eliminate such discriminatory and predatory practices, or alternatively recommend to Congress that an amendment to the Act be considered that would provide the Commission with authority to impose such requirements.

**C. Cable Franchise Reform Should Provide a Level Playing Field for all Current or Potential Competitors.**

Franchising reform has recently been receiving significant attention on both a state<sup>26</sup> and a national<sup>27</sup> level, particularly as that regime applies to telephone companies now seeking to provide video services. Congress attempted to address this issue in the 1996 Act when it created

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<sup>25</sup> *Id.* at 23293.

<sup>26</sup> Texas Legislature, Senate Bill 5, 79<sup>th</sup> 2d Called Session – 2005, which in a new Chapter 66 creates a state cable service franchising authority in the Texas Public Utility Commission.

<sup>27</sup> See Broadband Investment and Consumer Choice Act, S. 1504, 109<sup>th</sup> Cong. § 13 (2005), which states that a video service provider need not have a state or local franchise or be required to build out its distribution system in any particular manner.

the Open Video System (“OVS”) regime,<sup>28</sup> which ostensibly relieved telephone companies and others receiving OVS certifications, from the need to obtain a local franchise. The Fifth Circuit Court of Appeals did not agree and effectively emasculated the OVS concept in the *City of Dallas* case<sup>29</sup> by leaving in place the need to obtain a local cable franchise in order to provide OVS services.

The critical issues that must be addressed in efforts to reform the franchising process are the application of the benefits of such provisions to all competitive providers of multichannel video services, and the elimination of any requirement to build-out a video system equal in scope to an existing cable service provider within a specific franchise geographic boundary. Whatever the rules are they must be technology neutral. It should not matter whether the provider uses coaxial cable or another delivery medium. Requiring a new entrant to replicate an incumbent network is inherently anticompetitive. In most instances, the incumbent has had decades to build, upgrade and expand its network with limited or no competition. Significant portions of the funding for this historical expansion came from operations not the capital markets that new entrants have been forced to rely on. Today’s competitive entrant does not have the advantage of a captive customer base and a monopoly return on its investment. Regardless of the technology employed, the competitive entrant must be able to deploy its network based on its success, or lack thereof, in the market, not on an artificial regulatory requirement that has no relevance in today’s varied-technology and multi-provider environment.

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<sup>28</sup> As codified in 47 U.S.C. § 573.

<sup>29</sup> *City of Dallas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999).



The Commission needs to aggressively support a national policy that eliminates the franchise build-out requirement as anticompetitive and an anachronistic barrier to entry into the video market. The obvious beneficiary of such a national policy would be the consumer.

**D. Access to MDUs Continues to be a Barrier to Entry**

Access to MDUs continues to be an issue that will affect expansion of BSPs in geographic areas where MDUs are a significant part of the franchise territory and access to them has been denied through long-term exclusive contracts. Where franchise conditions require a new entrant to match the incumbent's footprint, the new entrant cannot serve MDU customers using plant it is required to build due to the incumbent's exclusive long-term contracts with MDU owners. BSPA members have also seen long-term exclusive MDU contracts used as an anticompetitive weapon prior to system build-out. For example, as reported last year, when it became known that BSPA member PrairieWave would be seeking authority to enter just a part of the Sioux Falls, South Dakota franchise area as a competitor, the incumbent cable provider stepped up efforts to obtain exclusive cable service agreements for up to 10 years with landlords of MDUs.

From a consumer viewpoint, an MDU resident can be locked into an older network with very limited capacity and no commitment to upgrade, when a fully upgraded service provider is available at the property boundary. This condition can clearly affect the level of options and available competition for MVPD service but it also affects the availability of high-speed data and competitive telephone services that are hosted on the same new network. This is particularly troublesome when the competitive expansion of high-speed data services is a national priority. Market and regulatory conditions may exist that fully support the deployment of the new system for both high-speed data and telephone, but the economics of the system installation are such that

the BSP cannot financially afford to provision service in an MDU facility unless it can offer all three services, including multichannel video services.

MDU access is a matter of consumer choice; long-term exclusive arrangements with MDU building owners foreclose opportunities for a significant segment of the market to enjoy the price and service benefits that come with competition. While some states have enacted statutes that prohibit exclusive agreements between incumbent cable operators and building owners,<sup>30</sup> a uniform, national solution is required. Given the impacts of long-term MDU exclusives on consumers and competitive providers, the BSPA urges the Commission to revisit its decision last year declining to prohibit perpetual and long-term agreements between incumbent cable operators and MDU building owners.<sup>31</sup>

**E. Access to Utility Poles**

Certain pole owners continue to create barriers to entry with respect to their obligations under the pole attachment provisions in Section 224 of the Communications Act to provide access to utility poles at just and reasonable rates. Currently, in order to obtain relief from unlawful pole attachment rates imposed by these pole owners, BSPs are forced to devote significant time and resources to complaint proceedings before the Commission that take years to resolve, and are often forced to re-litigate issues that have been decided against a utility. The Commission must expeditiously resolve pole attachment complaints, and needs to address repeated abuses of the pole attachment provisions of the Act by particular entities by subjecting

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<sup>30</sup> See Minn. Stat §§ 238.22-238.27. An attempt to create the same type of competitive environment failed in the 2005 South Dakota legislative session.

<sup>31</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, CS Docket No. 95-184, 18 FCC Rcd 1342, 1345 (2003). In contrast, Congress and the Commission did protect the satellite industry by ensuring DBS competitive entry through rules prohibiting restrictions on the placement of DBS antennas by tenants in their leased premises. See 47 C.F.R. § 1.4000. The failure to provide the same protection for a wireline competitor puts the wireline service at a distinct competitive disadvantage in a high density, otherwise highly competitive market.

those pole owners that repeatedly flout their Section 224 obligations to monetary forfeiture penalties. BSPs should not be required to divert resources from building new networks and serving more customers in order to pursue lengthy, repetitive complaint proceedings.

An additional issue that has arisen is that some utilities place an unreasonable limitation on the number of poles that a service provider can attach to within a given period of time. For example, Kansas City Power & Light, which serves the Kansas City metropolitan area, recently issued rules that limit the number of pole attachment applications a provider can submit to 150 poles every 45 days. This translates into the ability to attach to only 1200 poles a year, and effectively limits a new provider to approximately 30 aerial miles of construction per year. If a broadband service provider had obtained a franchise or franchises that required a significant amount of overhead construction, there is no way that a typical five-year build-out requirement could be fulfilled, given this limitation.

Finally, a further significant concern for BSPs is the disparity between the rate cable providers pay to attach to poles versus the rate telecommunications providers pay to attach to poles. If a broadband service provider utilizes circuit switched telephony to deliver its voice services, utilities have considered it a telecommunications carrier pursuant to 47 CFR § 1.1409 (e)(2) versus a cable provider pursuant to 47 CFR § 1.1409 (e)(1). There is a significant disparity between the calculation of pole attachment rates under these two provisions. For example, in the Kansas City metropolitan area, cable operators pay \$10.43 per pole to attach to utility poles. Everest Connections, the broadband service provider, who offers is voice service via circuit-switched telephony, is forced to pay the telecommunications rate of \$21.48 per pole. This disparity in pole attachment rates is unfair given that the incumbent cable provider is also offering voice services, but by virtue of the fact that it is offering Voice over Internet Protocol, it

is not forced to pay the higher rate because its service is not considered a telecommunications service.

### **III. OTHER POLICY CONSIDERATIONS**

#### **A. Voice over Internet Protocol (VoIP)**

The BSPA has previously filed comments concerning IP-enabled services.<sup>32</sup> The BSPA incorporates those comments by reference into this proceeding. The BSPA reiterates its view here that generally less regulation of VoIP is best, and that regulation is only necessary to protect consumers or promote competition. VoIP regulation should be technology and provider neutral, and must ensure that it does not give certain VoIP providers unfair competitive or other advantages vis a vis BSPs, and other facilities-based providers, that have invested in the facilities and infrastructure that make the broadband access necessary for VoIP, a reality. At a minimum, neutrality does not mean that a VoIP provider has some inherent right to use existing circuit-switched and/or IP networks without compensating the network provider for the costs of using the network, particularly in connection with terminating calls on the public switched telephone network.

The Commission surely understands that facilities-based providers will continue their investment in necessary network facilities in rural and urban areas where they perceive an opportunity for a return on that investment. Likewise, the Commission understands that there is no possibility of an opportunity for a return on investment where VoIP provider, use these networks to provide service, but there is no mechanism in place, particularly with last mile

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<sup>32</sup> *In the Matter of IP-Enabled Services*, Comments of the Broadband Service Providers Association, WC Docket No. 04-36 (filed July 14, 2004).

services, that provide for the network provider to be fairly and adequately compensated for that use. Without an accessible, well-managed, efficient cable network, VoIP service is not viable.

As with other services discussed in these comments, facilities-based competition is the most effective in providing quality service at fair prices to the consumer. The Commission must be mindful of this significant, consumer-oriented impact as it considers the issues in this NOI.

**B. Retransmission Consent**

On September 8, 2005, the Commission released its SHVERA Section 208 Report.<sup>33</sup> In that report, the Commission considered and appears to reject a petition<sup>34</sup> by the American Cable Association (“ACA”) asking the Commission to amend certain rules regarding retransmission consent, network non-duplication and broadcast exclusivity.<sup>35</sup> The ACA Petition reflected recent attempts by broadcasters seeking compensation on a per subscriber, per month basis for providing retransmission consent to have that programming included as part of basic cable service. ACA claims that if such efforts are successful, it will “add more than \$860 million to the cost of basic cable.”<sup>36</sup>

BSPA, like ACA, continues to have significant concerns about the ability of broadcasters to leverage the existing retransmission, non-duplication and exclusivity rules to demand exorbitant compensation for its programming. The BSPA asks that the Commission continue to monitor this situation and to be prepared to take corrective action when necessary.

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<sup>33</sup> *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2004) (“SHVERA Section 208 Report”).

<sup>34</sup> *Id.* ¶¶ 46-51.

<sup>35</sup> *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93 and 76.103*, American Cable Association, MB Docket No. 05-19 (RM-11203) (filed Mar. 2, 2005).

<sup>36</sup> *Id.* at 1.

**IV. THE TRANSITION TO DIGITAL TV SHOULD INCLUDE THE CONSUMER AND COMPETITIVE BENEFITS OF VOLUNTARY A LA CARTE**

BSPA has filed previous comments with the Commission related to the evaluation of *a la carte* carriage options for the MVPD industry.<sup>37</sup> BSPA and its individual members oppose all forms of mandatory *a la carte* where regulation mandates specific carriage of individual channels. On the other hand, BSPA believes that the ability of distributors to create additional and new package options that respond to individual consumer desires -- such as new mini-tiers or individual channels of content, along with the current bundles of content offered by all MVPDs -- could potentially further competition at the distribution level by allowing competing distributors the opportunity to define and offer their own solutions to consumer requests for either choice or diversity.<sup>38</sup>

During last year's FCC review of *a la carte* options, many opponents of *a la carte* options cited cost studies that concluded that the consumer would incur additional cost, not savings, from any implementation of *a la carte*. Major portions of the added cost associated with implementing *a la carte* were attributed to the cost of converting networks to all digital structure and upgrading all consumers to digital-capable TVs or digital boxes in order for them to receive and view the digital-delivered content. The fallacy in this argument is that, regardless of whether any form of *a la carte* reaches the market, we have already fully committed the industry to bear the cost of migrating to all digital platforms. In the context of any network that is already capable of all digital delivery of content, the true incremental cost of additional flexibility to

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<sup>37</sup>Comments Requested on A La Carte and Themed Tier Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Comments of Broadband Service Providers Association, MB Docket No. 04-207 (filed July 13, 2004).

<sup>38</sup> From a technological standpoint any type of *a la carte* structure, can only be implemented in an all-digital system structure.

offer new individual channels or new packages of channels is relatively minor compared to the potential benefits.

The BSPA therefore believes that MVPD providers operating an all digital network should have greater freedom to offer content in response to consumer interests. One of the inherent benefits of the migration to all-digital networks should be this added benefit to consumers and greater freedom for MVPDs to differentiate themselves in the market place by responding to consumer desires for different packages of program material.

At the same time, BSPA recognizes that the flexibility of distributors to offer *a la carte*-type arrangements (what we refer to here as “voluntary *a la carte*”) raises numerous questions. These need to be addressed in the marketplace, rather than on paper at the Commission, before any decision can be made regarding the final costs and benefits of *a la carte* offerings – whether to consumers, programmers, or distributors.

Accordingly, BSPA proposes that several of its members, together with those program suppliers and other cable providers who agree to participate, initiate focused, multi-year market tests in selected local markets, involving *a la carte*-type offerings. Some of the significant questions that can best be answered through these proposed market tests include:

- What number of subscribers would choose the current structure over a voluntary *a la carte* option?
- What level of “*a la carte*” will balance the needs of consumers, distributors, and content producers?
- How many new customers will come to MVPD systems when offered better choice?
- What really happens to advertising rates and structures as the true value of different subscriber environments is evaluated over time?
- Which channels or types of content may be receiving unfair subsidies in the current structure?

- Which types of content are not legitimately supported by an audience that is significantly large enough to warrant the current carriage?
- What is the potential financial impact on content producers and distributors?

The results of these market tests could then be used to assess both the benefits and potential issues presented by this structure. A market test of voluntary *a la carte* can only enhance the Commission's ability to come to the best conclusions and better inform the legislative debate in Congress regarding consumer choice, pricing, and indecency issues. BSPA therefore asks for the full endorsement and support of the FCC for the industry to pursue limited market tests of *a la carte* offerings, and to indicate its support for such an approach in its annual report to Congress in this proceeding.

## **V. CONCLUSION AND SUMMARY RECOMMENDATIONS**

The underlying purpose of this NOI is to evaluate the state of competition in the MVPD industry. The BSPA believes that the industry is quickly moving to business models and integrated services that require a perspective that goes beyond a more narrow television-only focus. The competitive success of new investments requires new entrants to compete in multiple services hosted on integrated networks that rely on fair access to the same video or other content. At the same time, the Commission must continue to address other impediments that inhibit competitive entry. BSPA therefore recommends the following actions be pursued by the Commission and addressed in its annual report to Congress:

- Evaluate competition on a market-by-market basis, rather than using national proxies that may overstate the true extent of competition in the video distribution market, and establish standards for effective competition that reflect market realities.
- Take steps to eliminate the incentive and ability of incumbent providers to use discriminatory or predatory pricing to foreclose entry, by requiring



incumbents to provide information to subscribers on all rate offers and/or requiring uniform pricing in a franchise area (or seeking authority from Congress to require uniform pricing).

- Expand the effective constraints of Section 628 to assure fair access to content when vertical integration exists to all forms of content and all types of distribution technology. Provide additional access protection for local sports and news. This assures that distributors competing with vertically integrated conglomerates or highly dominant clusters have fair access to content.
- Assure that the benefits of franchise reform are extended to all competitors and technologies in an equal and fair manner. The current build out requirements need to be eliminated for all new competitors.
- Eliminate exclusive long-term MDU agreements and continue.
- Resolve pole attachment complaints promptly, impose monetary forfeiture penalties on pole owners that repeatedly flout their Section 224 obligations, and eliminate the disparity in attachment rates between cable operators and BSPs offering telecommunications services.
- Support the development of near term market tests of voluntary *a la carte* anticipating the industry migration to all digital systems.

Respectfully submitted,

**BROADBAND SERVICE PROVIDERS  
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Dated: September 19, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of September 2005, a copy of the foregoing Comments of Broadband Service Providers Association was served by hand on each of the persons listed on the attached service list.

/s/  
Joanne Little

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